IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

EATON CORPORATION, *et al.*	PLAINTIFFS
VS.	CIVIL ACTION NO. 251-04-642
JEFFREY D. FRISBY, *et al.*	DEFENDANTS

RULINGS OF THE COURT RELATING TO THE DEFENDANTS' MOTION TO DISMISS, THE DEFENDANTS' MOTION TO DISMISS, AS SUPPLEMENTED, THE NOVEMBER 25, 2009 REPORT AND RECOMMENDATION OF THE SPECIAL MASTER, AND THE AUGUST 11, 2010 REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

Before this Court are the following: 1) January 4, 2006 Motion to Dismiss, filed by the Defendants; 2) November 24, 2009 Motion to Dismiss, as Supplemented, filed by the Defendants; 3) November 25, 2009 Report and Recommendation of the Special Master, David W. Dogan, III; and 4) August 11, 2010 Report and Recommendation of Special Master, David W. Dogan, III. The Court, having carefully studied the motions, extensive responses, briefs, numerous exhibits, Reports and Recommendations, the objections submitted by the parties, and having heard oral argument, hereby finds as fact and law, the following:

I. PROCEDURAL HISTORY

The subject lawsuit is, by far, the largest and most time-intensive litigation that has ever been before this judge. Accordingly, in the Court's opinion, inclusion of the following procedural history and timeline is necessary.

- On July 9, 2004 the subject lawsuit was filed by the Plaintiffs, which contained multiple claims of relief resulting from allegations that the Defendants stole proprietary information and trade secrets while employed by the Plaintiffs. The case was assigned to then-Hinds County Circuit Court Judge Bobby B. DeLaughter.
- On January 4, 2006, the Defendants filed a Motion to Dismiss and For Sanctions Against Plaintiffs for Unlawfully Compensating Fact Witness. This motion related solely to the Defendants' claims of unlawful compensation to Milan Georgeff, a fact witness and "whistleblower."
- On January 17, 2006, the Plaintiffs filed a Motion to Refer Matter to the Special Master regarding Defendants' Motion to Dismiss and for Sanctions.
- On April 7, 2006, Judge DeLaughter referred the matter to then-Special Master Jack Dunbar.
- On December 5, 2006, Special Master Dunbar issued a Report and Recommendation, regarding the Responsibility for Discovery Violations, Intent and Recommended Sanctions, finding that the Plaintiffs' discovery answers were "truly false" in an "intentional effort to mislead."
- On January 1, 2007, the Defendants filed a Supplemented and Renewed Motion for Dismissal and Other Sanctions based on Payment of a Fact Witness and Intentional Discovery Violations.

- On April 6, 2007, then-Judge DeLaughter denied the Defendants' Motion to Dismiss and ruled on Plaintiffs' discovery sanctions and lifted the stay on discovery. Specifically, DeLaughter ordered that Michael Allred (former counsel for Plaintiffs), alone, was responsible for the discovery violation (related to Georgeff), but that Eaton and Michael Schaalman, counsel for Eaton, had knowledge of the discovery violation. As a result, DeLaughter ordered that the Defendants should be awarded sanctions, against Allred, Schaalman (counsel for Eaton), and Eaton, in amount that would have been incurred, had the Defendants filed a 'hypothetical' Motion to Compel.
- On October 29, 2007, then-Judge DeLaughter, *sua sponte*, removed Jack Dunbar as Special Master and appointed William Larry Latham as Special Master.
- On January 4, 2008, then-Judge DeLaughter recused himself from the subject case "due to the time needed to assist authorities in the federal investigation." DeLaughter requested Senior Judge W. Swan Yerger to re-assign the case.
- On January 14, 2008, Senior Circuit Court Judge Yerger reassigned the case to his docket, in view of the unavailability of the other judges for a Motion for Emergency Status Conference.
- On January 24, 2008, the Defendants filed a Motion for Stay of Discovery Pending Review of Prior Rulings of Judge DeLaughter, alleging, for the first time, improprieties regarding the relationship of then-Judge Delaughter and Ed Peters. The Defendants also requested that they be permitted to conduct discovery regarding the same.
- On January 28, 2008, Special Master Latham requested to appear before counsel and Judge Yerger. The request was granted, and Latham tendered his resignation at the hearing. Latham resigned and gave the following reason: his concern regarding a

possible appearance of impropriety by Ed Peters and due to him [Latham] becoming aware of possible *ex parte* communication(s), (through the aforementioned Defendants' January 24, 2008 motion), made to Latham and/or his office, by Ed Peters, an attorney for the Plaintiffs, who had not entered an appearance of record.

- On February 1, 2008, Judge Yerger entered an Order Accepting the Resignation of Larry Latham, per his request at the hearing on January 28, 2010.
- On March 7, 2008, the Court entered an Order, agreed as to form, containing the following rulings: a) a Stay of Discovery Pending the Court's Review of Judge DeLaughter's prior rulings (during the time period when Peters was involved in the case); b) instructions for procedure for the appointment of a Special Master; and c) the Court's intent to conduct an inquiry into alleged *ex parte* communications between Peters and DeLaughter.
- On April 15, 2008, the Court appointed David W. Dogan, III, as Special Master, due to the parties' inability to agree on a new Special Master. In the Order of Appointment, the Court ordered Special Master Dogan to conduct the "inquiry of any alleged attempt to influence any judicial officer" and to review prior rulings by then-Judge DeLaughter during the time in which Peters was involved in the case.
- On June 12, 2008, this Court reserved its ruling on the Defendants' previously filed Motion to Dismiss, until such time that the Court was presented with further evidence, if any, regarding the inquiry into the allegations concerning Peters and DeLaughter. The Court also ordered that the previously filed Motion for Sanctions was well-taken, regarding the intentional discovery violations related to the Plaintiffs' fact witness, Milan Georgeff, in an amount to be determined by supplemental submissions by the parties.

The Court's ruling set aside then-Judge DeLaughter's orders of April 16, 2007 and June 4, 2007 and adopted, in part, the December 5, 2006 Report and Recommendation of then-Special Master Jack Dunbar.

- On June 19, 2009, this Court entered an Opinion/Order finding that the "crime-fraud exception" was applicable to certain documents of the Plaintiffs; the Court found, pursuant to M.R.E. 502(d)(1) and *Hewes v. Langston*, 853 So.2d 1237 (Miss. 2003), that certain documents evidenced Peters' improper *ex parte* contacts with then-Judge DeLaughter, and that the same constituted a fraud on the court and on the judicial system. The Court further found, pursuant to the applicable law, that the documents indicated that the Plaintiffs "either knew or reasonably should have known of the ongoing fraud perpetrated by Peters."
- On September 21, 2009, the Mississippi Supreme Court entered a final order denying the Plaintiffs' Petition for Interlocutory Appeal regarding this Court's June 19, 2009 Opinion/Order, on the "crime-fraud exception" issue.
- On November 24, 2009 the Defendants filed a Motion to Dismiss, as Supplemented, relating to the court-ordered inquiry into the allegations of impropriety between Peters and DeLaughter.
- On November 25, 2009, Special Master Dogan submitted a Report and Recommendation regarding depositions taken in connection with the investigation into potential judicial interference in this civil action. On January 7, 2010, the Court withheld its consideration of the November 25, 2009 Report and Recommendation, until such time that the Court considered the Defendants' Motion to Dismiss, as Supplemented.

- On November 30, 2009, the Court referred the Defendants' Motion to Dismiss, as Supplemented, to Special Master Dogan for a Report and Recommendation.
- On January 6, 2010, this Court entered an Opinion/Order awarding sanctions to the Defendants in the amount of $1,560,642.83, relating to the intentional discovery violations concerning the fact witness/whistle blower, Milan Georgeff. The Mississippi Supreme Court entered its final order denying the Plaintiffs' Petition for Interlocutory Appeal regarding the same on May 26, 2010.
- On December 15, 2009, the Plaintiffs filed a Motion to Strike, related to evidence and exhibits submitted by the Defendants in support of the Motion to Dismiss, as Supplemented, which was referred to Special Master Dogan for a Report and Recommendation.
- On June 9, 2010, this Court entered its Opinion/Order regarding the Plaintiffs' Motion to Strike, which related to evidence submitted by the Defendants in support of the subject Motion to Dismiss.
- On August 11, 2010, the Special Master filed his Report and Recommendation regarding the Defendants' Motion to Dismiss, as Supplemented, wherein he recommended that the Defendants' Motion to Dismiss, as Supplemented, be granted. This issue is currently before this Court.

II. November 25, 2009 Report and Recommendation of the Special Master

On October 30, 2009, this Court, pursuant to its authority provided in M.R.C.P. 53(c), issued an Order of Reference, requesting Special Master Dogan to issue a Report and Recommendation regarding the various depositions attended by him. The Court referred this

matter, as a result of "exceptional conditions," as explicitly set forth in the Court's April 15, 2008 Order Appointing Special Master. Namely, Special Master Dogan attended and presided over numerous discovery depositions, which are crucial to the subject "inquiry" regarding the allegations of improper *ex parte* contact between Ed Peters and Bobby DeLaughter. As the Court's October 30, 2009 Order stated, "Special Master Dogan was present at the depositions, presiding over the inquiry, and his Report and Recommendation shall consist of any observations and recommendations related to the documents and Interrogatory responses to which Plaintiffs' objections of privilege have been overruled." *October 30, 2009 Order*. The Plaintiffs have objected to this Court's request for the Report and Recommendation by the Special Master. The Plaintiffs' objections were based upon claims that discovery was "ongoing," and that the reference contained no "issue of fact and law." The Plaintiffs have continued to make requests for an evidentiary hearing before this judge, despite the Court's repeated rulings that such a hearing was unnecessary and not in the interest of judicial economy. On April 15, 2008, this Court entered an Order Appointing Special Master, which specifically laid out authority vested in Special Master David W. Dogan, III. The Order stated that "exceptional conditions require[d] the appointment of a Special Master and the **broad referral of matters to the Special Master by this Court...**" *April 15, 2008 Order Appointing Special Master*, pg. 1 (emphasis added). Further, the Order stated that the Special Master's **"rulings regarding any objection or instructions not to answer questions shall be binding on the parties during the deposition and shall be followed as though made by the Circuit Judge.**" *Id.* at 8 (emphasis added). Accordingly, the Court finds that there was ample notice to the parties that the Special Master would be presiding over depositions and rendering rulings that would stand as rulings of the Court.

This Court's massive docket with limited staff on this case (one judicial law clerk) necessitated the use of the Special Master. As a result of the numerous depositions involved and the importance of witness credibility, knowledge and veracity at issue, this Court necessarily requested the November 25, 2009 Report and Recommendation from the Special Master.

After due consideration, the Court finds that the November 25, 2009 Report and Recommendation of the Special Master is hereby accepted as findings of fact, only as it relates to the Special Master's findings at the various depositions. This ruling particularly includes the deposition summaries and observations of credibility made by the Special Master regarding the witnesses, either in the report or in the attached summaries. Pursuant to M.R.C.P. 53(g)(2), the Court rejects, however, any conclusions of law made by the Special Master in the November 25, 2009 Report and Recommendation. The Court agrees with the Plaintiffs that the same are premature and will be considered separately with the Motion to Dismiss. Pursuant to this ruling, the Court hereinafter incorporates and adopts the Special Master's observations of credibility and findings regarding specific witnesses as findings of fact regarding the testimony and appearances during their respective depositions.

III. Defendants' Motion to Dismiss and Motion to Dismiss, as Supplemented and August 11, 2010 Report & Recommendation

A. Findings of Fact

a. Findings of Fact Regarding Peters/DeLaughter Inquiry

This Court's previous and extensive findings are clear: the Court has been presented evidence that Ed Peters, former counsel for the Plaintiffs, had improper *ex parte* contacts with

then-Judge Bobby B. DeLaughter, on behalf of the Plaintiffs. *See Generally June 19, 2009 Opinion/Order.* This Court has also found that, pursuant to the applicable law, the Plaintiffs' documents, submitted pursuant to Orders of this Court, for *in camera* review, substantiate that the Plaintiffs either knew or should have known of the *ex parte* contacts and improprieties made by Peters with Judge DeLaughter on the Plaintiffs' behalf. *See Generally June 19, 2009 Opinion/Order.* However, at the end of this Court-ordered "inquiry," which was instigated by the Defendants' allegations of an improper relationship between Peters and DeLaughter, the Court must now decide whether the evidence is sufficient, under the applicable law and applicable standard of proof, to prove knowledge, either actual or implied, of these improper contacts by the Plaintiffs and/or the Plaintiffs' counsel. If the Court finds that the evidence is sufficient, the Court believes that a dismissal with prejudice as to all of the Plaintiffs' claims would be the appropriate penalty. Special Master Dogan did recommend a dismissal with prejudice in his August 11, 2010 Report and Recommendation. The Court has considered the findings of fact made by Special Master Dogan in his August 11, 2010 Report and Recommendation, and accepts the same as the Court's findings of fact, as hereinafter set forth.

b. Findings of Fact Regarding Intentional Discovery Violations re: Milan Georgeff

As noted above, the Court accepts the Special Master's findings of fact regarding the Peters/DeLaughter discovery inquiry; the Court, however, hereby limits the acceptance of the Special Master's findings of facts to the events and evidence related to the Peters and DeLaughter inquiry. Further, the Court, declines to accept as relevant the Special Master's findings of fact regarding the Georgeff issue(s) (found at pgs. 1-19 of the R & R). To be clear, the Court does not find that the Georgeff findings of fact made by the Special Master to be

clearly erroneous themselves; instead, the Court finds that the same are not relevant to the issue of sanctions and/or dismissal before the Court, and that, therefore, those findings are clearly erroneous as to the issue before this Court, pursuant to M.R.C.P. 53(g)(2). The Court does find that the Georgeff findings of fact are relevant as background information, only. Accordingly, the Court finds that the Georgeff findings of fact are relevant for continuity purposes, but not relevant as to the subject issue of sanctions and/or dismissal. As correctly noted by the Special Master, on January 6, 2010, this Court sanctioned the Plaintiffs in the amount of $1,560,642.83, relating to the Georgeff issue(s). Accordingly, the Court finds that the issue of the Plaintiffs' intentional discovery violations, related to Milan Georgeff, were extensively litigated and finally decided. This Court finds that the aforementioned monetary sanctions made the Defendants' whole in regards related to Georgeff. The Defendants would not be entitled to a dismissal for those violations. As a result, the Court will only consider the issue of the improprieties and *ex parte* contacts of Peters with DeLaughter, which followed the intentional discovery violations related to Georgeff. Any decision made by the Court herein will be based on the Defendants' allegations and evidence, the Plaintiffs' defenses and counter-argument, the Special Master's findings, the Court's previous findings, and the applicable law regarding only the allegations of improper *ex parte* contact between Peters and DeLaughter and any knowledge of Eaton and its counsel.

B. Conclusions of Law

a. Applicable Standard of Proof

Mississippi law has long held that misconduct, particularly intentional misconduct, by a party to litigation should not be tolerated and should be subject to punishment, albeit just and fair

punishment. As the old adage goes, "the punishment should fit the crime." In the subject case, the Court is not faced with a "crime" but instead is faced with the most serious type of fraud, "fraud on the court," which has been defined as follows:

> **Fraud upon the court should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.**

Tirouda v. State of Miss., 919 So.2d 211, 216 (Miss.Ct.App. 2005) (citing 7 Moore, Federal Practice p 60.33 at 515 (1971)) (emphasis added). More specifically, fraud upon the court "'is reserved for only the most egregious misconduct', a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision' is required." ***Tirouda v. State of Miss.***, 919 So.2d 211, 216 (Miss.Ct.App. 2005) (quoting ***Wilson v. Johns-Manville Sales Corp.***, 873 F.2d 869, 872 (5th Cir. 1989)(internal citations omitted)). The ***Tirouda*** court held that "the trial court is best able to determine whether a fraud has been perpetrated upon it." *Id* at 216.

In *Scoggins v. Ellzey Beverages, Inc.,* 743 So.2d 990 (Miss.1999), the court emphasized the following, which is applicable to the issue before this Court:

> **'A trial is a proceeding designed to be a search for the truth.' *Sims v. ANR Freight System, Inc.,* 77 F.3d 846, 849 (5th Cir.1996). When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit.**

Scoggins at 994-995 (emphasis added)). In this Court's June 19, 2009 Opinion/Order, which related to the Court's extensive *in camera* inspection of documents produced by the Plaintiffs, the Court found the following:

> The fraud on the court and on the judicial system, committed by Peters, a former attorney for Eaton, is clearly ascertained through the documents themselves, and through reasonable inferences, supported by substantial evidence, made by this

> Court, as the factfinder. *Id.* The Court also finds that after Eaton secretly retained Peters, the furtherance of his fraud on the court and the judicial system was either known or reasonably should have been known to Eaton, thereby comporting with the exception found in Rule 502(d)(1) M.R.E.

See June 19, 2009 Opinion/Order, pg. 25. The Plaintiffs contend that "[t]he questions of whether the *ex parte* contacts evidenced by those documents actually happened and whether they constitute a fraud remained for determination on the basis of all the evidence submitted. That determination still remains to be made, because the Special Master did not make it, erroneously thinking that this Court had already done so." *Plaintiffs' Objections to August 11, 2010 R & R*, pg. 10. In this Court's opinion, the clear language from the June 19, 2009 Opinion/Order, as cited above, supports the premise that the Court has already made that determination. However, the Court makes the unequivocal finding herein (as it did in its Opinion of June 19, 2009), that the documents evidenced a fraud on the court, which was known or should have been known to Eaton. Clear and convincing evidence of Eaton's knowledge does not require direct proof. Instead, reasonable inferences can be used to support such a finding. *See generally Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983) (noting the difficulty of proving the state of mind in a fraud cause and holding that circumstantial evidence can be more than sufficient). The question remaining for the Court is whether the Court's finding of knowledge by Eaton is supported by the applicable standard of proof now before the Court related to the Motion to Dismiss, as supplemented.

The Special Master found, and this Court agrees, that the Mississippi appellate courts have not yet ruled on the requisite standard of proof to be applied in a situation involving sanctions for litigation misconduct or corruption of the judicial system by a litigant, in a civil

sanctions situation. [1] Fortunately, the legal system is not presented with such a scenario very often. The Plaintiffs first contended that the applicable standard of proof to be applied to the Defendants' Motion to Dismiss [2] is the "beyond a reasonable doubt" standard (the standard in a criminal proceeding). Pursuant to *Mississippi Bar v. Robb*, 684 So.2d 615, 622 (Miss. 1996) and *Reynolds v. Reynolds*, 755 So.2d 467, 469 (Miss.Ct.App. 1999), this Court rejects that argument. In *Robb*, the Mississippi Supreme Court held that the purpose of sanctions is: "(1) to punish the wrongdoer; (2) to deter further violations on the part of the offender and the general community of lawyers; and (3) to reinforce the confidence of the public in the ability of the legal profession to govern itself." *Id* at 622. Pursuant to *Reynolds v. Reynolds*, 755 So.2d 467, 469 (Miss.Ct.App. 1999), direct evidence is not required regarding inherently secret relationships. *Reynolds v. Reynolds*, 755 So.2d 467, 469 (Miss.Ct.App. 1999) (citing *Owen v. Gerity*, 422 So.2d 284, 287 (Miss. 1987). Due to the "inherently secretive nature" of schemes to improperly influence a judge and in consideration of the detrimental effect such schemes have on our system of justice, this Court finds that it is only logical, in accord with Mississippi law, that a stringent standard of "beyond a reasonable doubt" would be inapplicable here.

The Plaintiffs assert, in the alternative, that at the very least, a standard of "clear and convincing evidence" should apply. The Defendants argue that the appropriate standard of proof

[1] The Plaintiffs argue that the *Tirouda* case provides an applicable standard of proof, but importantly, the *Tirouda* case involves a litigant's attempt to set aside a final judgment, alleging fraud on the court, due to the perjury of multiple witnesses. Setting aside a final judgment requires a finding of "clear and convincing evidence"; however, the Mississippi Supreme Court has clearly held that civil sanctions in ongoing litigation are within the Court's discretion. *See Manning v. Tanner*, 594 So.2d 1164, 1167 (Miss 1992); *See also Pierce v. Heritage Props., Inc.*, 688 So.2d 1385, 1387 (Miss. 1997) (affirming a discretionary dismissal resulting from the Plaintiff's willful misconduct and pursuant to the Court's inherent power to protect the integrity of the judicial process). Further, the only mention of "clear and convincing evidence" in *Tirouda* is found in FN. 4, which is solely related to distinguishing the facts in *Tirouda* from another Mississippi case. *Tirouda* at 216.

[2] Any reference herein to the Defendants' Motion to Dismiss refers to both the original Motion to Dismiss and the Motion to Dismiss, as supplemented. Any reference to Exhibits refer to the Exhibits to the Motion to Dismiss, as supplemented, and as provided to this Court and cited by the Special Master.

is by "a preponderance of the evidence," and the Special Master agreed. Subsequently, the Defendants requested further findings and conclusions that, considering the evidence submitted, a dismissal would be appropriate under either a "clear and convincing" standard or "a preponderance of the evidence" standard. This Court agrees with the Special Master's finding that "[t]he balancing analysis and the remedial nature of the requested sanctions favor the preponderance standard for this case." *See August 11, 2010 R & R*, pg. 55. Notably, in the Plaintiffs' Objections to the Special Master's August 11, 2010 Report and Recommendation, the Plaintiffs make a familiar argument regarding their position of "clear and convincing evidence." The Plaintiffs assert that because this Court has previously cited a definition of "fraud on the court" from the case of *Tirouda v. State*, 919 So.2d 211 (Miss.Ct.App. 2005), then the Court should also utilize the "clear and convincing" standard found in *Tirouda* for setting aside a final judgment, due to the perjury of multiple witnesses. *Id.* The Plaintiffs made a similar argument in their July 10, 2009 Petition for Interlocutory Appeal before the Mississippi Supreme Court, wherein they stated: "a finding of fraud must be based on 'clear and convincing' evidence... The trial court failed to acknowledge, or meet, this high order of proof." *July 10, 2009 Petition for Interlocutory Appeal*, pg. 8. The Mississippi Supreme Court denied the Plaintiffs' Petition for Interlocutory Appeal on September 21, 2009.

The Court's utilization of the definition of "fraud on the court," found in *Tirouda*, is strictly an analogy between the broad definition and the Plaintiff's conduct herein. Essentially, "fraud on the court" is 'egregious misconduct,' which the Mississippi Supreme Court has found may, under certain circumstances, warrant a dismissal of the case. *See Pierce v. Heritage Props., Inc.*, 688 So.2d 1385 (Miss. 1997); *Amiker v. Drugs for Less, Inc.*, 796 So.2d 942, 945 (Miss. 2000). Accordingly, the Court finds that the Plaintiffs' claim that *Tirouda* supports a

standard of "clear and convincing evidence" is not well-taken. However, notwithstanding the Court's opinion that Mississippi law does support applying a standard of "by a preponderance of the evidence" to the subject Motion to Dismiss, the Court concludes that, under current Mississippi law, either standard could apply. As a result, the Court will analyze and consider the evidence under a "clear and convincing" standard. Logically, if the Defendants meet their burden pursuant to the authority and requirements of "clear and convincing evidence," the Court finds that the same conclusion would be reached if applying the less stringent "preponderance of the evidence standard."

b. Existence of "Red Flags" and Credibility Determinations by the Special Master

In *Barrett v. Jones, Funderburg, Sessums, Peterson, & Lee, LLC*, 27 So.3d 363 (Miss. 2009), the Mississippi Supreme Court reiterated that "[a] court has inherent power to impose sanctions in order to protect the integrity of the judicial process." *Id* at 370 (internal citations omitted). The *Barrett* court further stated:

> Of particular relevance in this case, Uniform Rule of Circuit and County Court Practice 1.10 provides that "no person shall undertake to discuss with or in the presence or hearing of the judge the law or the facts or alleged facts of any case then pending in the court or likely to be instituted therein, ... nor attempt in any manner, ... to influence the decision of the judge in any such case or matter." Uniform Rule of Circuit and County Court Practice 1.03 provides that any person embraced by the rules who violates any provision of the rules "may be subjected to sanctions, contempt proceedings, or other disciplinary actions imposed or initiated by the court."

Barrett, supra at 370. In *Barrett*, the trial court found that the members of a joint venture, [3] Scruggs Katrina Group, were vicariously liable for partner, Richard Scruggs', bribery attempt and other misconduct, therefore dismissing the underlying action. The Mississippi Supreme

[3] "A joint venture is a single purpose partnership." *Braddock Law Firm, PLLC v. Bencel*,949 So.2d 38, 50 (Miss.Ct.App. 2006) (internal citations omitted).

Court reversed the trial court's dismissal, finding that there was "no evidence of 'red flags' that should have alerted the [other members/partners] to Scruggs's activities." *Barrett, supra* at 376. Notably, and despite the Plaintiffs' argument to the contrary, the facts before this Court differ greatly from those before the Mississippi Supreme Court in *Barrett*, as shown hereinafter.

i. "Red Flags" Attributable to Peters and Eaton

The *Barrett* court factually distinguished another Mississippi Supreme Court case, *Duggins v. Guardianship of Washington*, 632 So.2d 420 (Miss. 1993). In *Duggins*, the Mississippi Supreme Court affirmed a chancellor's findings that "there were sufficient 'red flags' which should have caused Duggins to realize that something was amiss." *Duggins* at 429. Likewise, as discussed hereafter, the Court finds that Peters' actions resulted in a multitude of 'red flags' that should have caused Eaton to "realize that something was amiss." *Id.*

In *Duggins*, counsel for the Plaintiff associated another attorney regarding a guardianship matter. The associated attorney misappropriated funds, and the chancery court found that the misconduct of the second attorney was attributable to the first. *Duggins, supra.* The Mississippi Supreme Court found that the misconduct was committed "while in furtherance of the partnership and was certainly within the partnership business." *Duggins, supra* at 428. In the subject case, *Duggins* applies when evaluating the "red flags" presented by Peters' and DeLaughter's misconduct, which should have been clear to Eaton and its counsel. It is clear, when considering the totality of the circumstances, that Peters was hired due to Eaton's being assured that he was the "closest possible associate" of then-Judge DeLaughter, to work on Eaton's behalf. *Exhibit* 5047. Further, in the subject case, the Court finds that Peters' intentional misconduct and attempts to influence then-Judge DeLaughter were made solely to influence

judicial decisions in Eaton's favor, and either was known or should have been known to Eaton and its counsel. The improper *ex parte* contacts by Peters with DeLaughter are detailed in Peters' statements to FBI agents for the Northern District of Mississippi. These admissions remain uncontradicted, and were in fact buttressed by Peters' assertion of his Fifth Amendment right against self-incrimination in a deposition related to the subject case. *See August 11, 2010 R & R*, pp. 45-52; *See generally LiButti v. U.S.*, 107 F.3d 110, 121 (2nd. Cir. 1997). While Peters' statements are certainly damaging admissions, they, themselves, do not provide direct evidence of knowledge of Eaton or its counsel. [4] Nevertheless, Eaton's argument as a "blameless client" fails. Eaton asserts that the Court must "accept as true the sworn testimony favorable to Eaton," and that inferences "contrary to sworn deposition testimony" are not permissible. *See Plaintiffs Objections to August 11, 2010 R & R*, pg. 2. As apparent from the Special Master's findings, reasonable inferences were drawn when Eaton's counsels' memories "failed" regarding specific communications. Further, as previously referenced herein and contrary to the Plaintiffs' assertions, the Special Master did, in fact, make credibility findings regarding Eaton's counsel at their respective depositions, for this Court's consideration. *See November 24, 2009 R & R and Deposition Summaries*, pg. 9. Special Master Dogan found the following: "**Having reviewed the documents introduced as exhibits, and observing the demeanor of the witnesses while they testified, I find it incredible [5] that no one on the Eaton team was aware of the impact**

[4] Any reference herein to knowledge by Eaton and its counsel refers to the Plaintiff, Eaton Corp, and its counsel and/or officers, Vic Leo, Vice-President and Chief Counsel for Eaton, Corp., Mark McGuire, General Counsel and Executive Vice President for Eaton, Corp., Taras Szmagala, Jr., Vice-President and Chief Counsel of Eaton, Corp., Michael Schaalman, outside counsel for Eaton on the subject case, and of course, former counsel Ed Peters. *See* Leo Depo., pg. 8; McGuire Depo, pg. 7; Szmagala Depo., pg. 3.; December 4, 2008 Transcript before Special Master Dogan, pg. 92; 131. The Court does not find, and the Defendants do not assert, that any local Mississippi counsel for Eaton had knowledge of the improper *ex parte* contacts made by Peters on behalf of Eaton.

[5] Incredible is defined as "beyond belief; impossible or very difficult to believe." *Encarta Dictionary*: English (online version).

Peters was having on the rulings that Eaton was receiving. There were numerous "red flags"....." *Id* at 9 (emphasis added). Further, Special Master Dogan found, and the Court accepts as fact herein, that "[t]he witnesses were...hard pressed to present a coherent, consistent basis for hiring Peters and explaining the role he was to play in the litigation." *Id* at 9. The Plaintiffs' assertions that the Special Master failed to make any credibility findings is mistaken. *See Plaintiffs' Objections to August 11, 2010 R & R*, pg. 2; *Plaintiffs' Rebuttal Memorandum*, pg. 1. Accordingly, the Court finds that the following constitute clear and convincing evidence of 'red flags' that were clearly known, or should have been known to Eaton; the same represent clear and convincing evidence to this Court of misconduct by Peters on behalf of Eaton and Eaton's knowledge and/or "negligence and inaction in investigating" regarding the same: [6]

a) Peters' Failure to Enter an Appearance- It is undisputed that Peters was hired as DeLaughter's "closest possible associate;" Allred, former counsel for Eaton, made that clear to Leo and Schaalman, corporate officer and in house-counsel and outside counsel for Eaton, respectively. *Exhibit* 5047. Schaalman and Leo clearly understood the possible recusal implications that stemmed from Peters' involvement. *Exhibit* 5078; Schaalman Depo. at 254-259; Leo Depo. at 75-77. Accordingly, Eaton and its counsel kept Peters' involvement a secret, despite the fact of Eaton's knowledge that Peters, who had never made an appearance in the case, was having conversations with the Court involving various matters.

[6] In the August 11, 2010 Report and Recommendation, the Special Master made very comprehensive findings of fact regarding the events that provide clear and convincing evidence of the improper *ex parte* contacts of Peters with DeLaughter. *August 11, 2010 R & R*, pp. 19-22. Further, the Special Master also made detailed findings of fact regarding clear evidence that Eaton either knew or should have known of these improper contacts on its behalf. *Id* pp. 23-29. As a result, this opinion will discuss only a few of these "red flags" and examples of direct or implicit knowledge. The Court adopts the findings of fact made by the Special Master, as referenced aforementioned.

Exhibits 5051; 5116; 5078. The importance that Eaton placed on the secrecy of Peters' involvement was further made clear through an e-mail sent by Mary Persch, secretary to Michael Schaalman, outside counsel for Eaton. The e-mail was sent by Persch to other secretaries involved in the subject case. Persch made clear that " we shouldn't list Ed Peters' name on anything, even as a bbcc. His name shouldn't appear and we will send him, everything separately from all parties, even the bcc's..." *Exhibit* 5086. A follow-up e-mail from Persch provided more clarification, stating "[t]he concern really is just that perhaps a mishap will happen and these bcc and bbcc listings could accidently be sent and **at this point, Michael [Schaalman] doesn't want the other side to see his name.**" *Id.* (emphasis added). The Special Master found that, when deposed, Mary Persch had no specific recollection of Schaalman giving her the instruction to circulate the e-mail or the reasoning as to why the e-mail was to be circulated." *See November 24, 2009 R & R*, pg. 6. Schaalman gave a paltry explanation that Peters was "technologically challenged;" therefore, Schaalman instructed that Peters' name be left off correspondence, so Peters would not accidentally divulge privileged information. *Schaalman Depo.* at 67-69. The Court finds, by clear and convincing evidence, that Eaton and its counsel intentionally hid Peters' involvement from the Defendants, despite knowledge that Peters was communicating with the Court regarding various matters, in hopes of avoiding a "Motion to Disqualify (Ed Peters-when he enters an appearance- and the Judge)." *Exhibit* 5052.

b) Peters' Known Contacts with the Court- On January 16, 2007 Peters' time records reflect his contacts with Schaalman and the Court regarding a contested order that DeLaughter issued that same day. *Exhibits* 5051; 5116. Peters' time records also indicate communications with the Court Administrator regarding trial settings, which was a disputed issue. *Id.* Peters admitted that his "presence in the court was influence [sic] for his client[,]" regarding the subject case. *Exhibit 5078* at Davidson 88. Peters' statements to the federal grand jury and federal investigators in the Northern District of Mississippi contain Peters' admissions that he had ex parte contact with DeLaughter. *Id.*

c) Eaton's Attempt to Explain Peters' Contacts with the Court- The most direct documents which evidence Eaton's and its counsel and/or corporate officers' knowledge of Peters' improper contact on its behalf are found in *Exhibits* 5052 and 5061. Exhibit 5052 is an e-mail from Vic Leo, Vice-President and Chief Counsel for Eaton, to Mark McGuire (General Counsel for Eaton), Taras Szmagala (Vice-President and Chief Counsel for Eaton), Sharon O'Flaherty (internal Eaton counsel) and Theresa Thomas (internal Eaton employee). In the e-mail, Vic Leo states that Peters "intends to speak with the Court Administrator and the Judge about the trial date. This may take some finessing." *Exhibit* 5052. The e-mail goes on to state that when Leo asked Peters "what the chances were that the Judge would simply withhold ruling on the amount of any monetary sanctions against Allred and Eaton until later in the case, possibly after the trial[, something that was very important to Eaton,] Ed said he believed that there was 'a 100% chance that would happen; maybe I am off a percent or two.'" *Exhibit*

5052. When offered a chance to explain this language at his deposition, Leo stated that this conversation with Peters "gave no indication" of any *ex parte* contact with then-Judge DeLaughter. *Leo Depo.* at 231-232.

In Exhibit 5061, Vic Leo sent an e-mail to Mark McGuire and Sharon O'Flaherty regarding the possible recusal of a judge in the federal criminal case. Leo stated that "Judge DeLaughter felt uncomfortable about the contact from Judge Lee and **certainly Ed Peters has taken his [DeLaughter's] temperature on this meeting and he is recommending that we go forward with it.**" *Exhibit* 5061 (emphasis added). When given a chance to explain this language, Leo stated that "[t]his is not accurately written." *Leo Depo.* at 199. Leo further stated that "what was intended to be conveyed here was that Ed Peters' temperature was taken." *Id.* at 200. Leo gave a different explanation at a December 4, 2008 hearing before Special Master Dogan. (See Transcript of December 4, 2008 hearing, pg. 144-145, wherein Leo explained that "taken his temperature" were his words, and he used that phrase in order to "convey to Mark [McGuire, Executive Vice President]...that we needed to do this [talk with DeLaughter about the federal case], and the group felt we needed to do this." Further, Leo testified that Schaalman reported to him that "Ed says we're fine on that. He doesn't see an issue there."). In Leo's December 4, 2008 testimony, there was never a reference to "taking Ed Peters' temperature."

The aforementioned instances are just a few examples from an extensive record of clear and convincing evidence of Eaton's "negligence and inaction in investigating [Peters']

suspicious conduct." *Barrett* at 375 (citing *Duggins, supra*). As shown, the aforementioned facts, and the findings of Special Master Dogan, coupled with reasonable inferences, serve as direct evidence and/or strong circumstantial evidence, of Eaton's knowledge of Peters' improper contacts, through Eaton's corporate officers and Wisconsin counsel. As the Court found in *Duggins*, contrary to Eaton's claim of being victimized by Peters' allegedly 'unauthorized' misconduct, Eaton is not the true victim. Instead the true victim is the justice system and its integrity. The Court finds, by clear and convincing evidence, that Eaton and its counsel were aware of and, in fact, sanctioned Peters' clandestine actions, either through affirmation or inaction, with then-Judge DeLaughter, for Eaton's benefit. Eaton, through its counsel, basically "turned Peters loose," without an appearance by Peters in the case, to "play a fast and loose" role, initiating *ex parte* contacts to the benefit of Eaton and to the detriment of the Defendants. The gross impropriety involving Ed Peters, the Plaintiffs, and then-Judge DeLaughter cannot be disregarded or condoned by this Court. With "red flags" flying throughout Peters' surreptitious and improper involvement in this case, Eaton, through its counsel, clearly never 1) required Peters to make an appearance in the case, and to prohibit any *ex parte* contact with Judge DeLaughter having been aware of his wrongful and improper actions and/or 2) removed Peters from any further involvement in the case, despite the numerous "red flags," and 3) advised the Defendants' attorneys of Peters' involvement. Peters' improper *ex parte* contacts with DeLaughter were in clear violation of U.C.C.C.R. 1.10. As shown, Eaton and its counsel were not "blameless" in this regard. Instead, Eaton and its counsel are also in clear violation of U.C.C.C.R. 1.10, which states, in relevant part, "no person shall...attempt in **any manner**...to influence the decision of the judge in any such case or matter." *U.C.C.C.R.* 1.10 (emphasis added).

c. Dismissal pursuant to *Pierce v. Heritage Properties, Inc.* and authority from other jurisdictions

In the case of *Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997), the Mississippi Supreme Court adopted several factors for the dismissal of a case as a sanction. The *Pierce* case is analogous regarding the issue of dismissal, as a sanction, and the factors are a guide in that regard. However, the *Pierce* case is factually distinguishable from the subject case, as it involves a discovery violation and not improper *ex parte* contacts and attempts to improperly influence a judge. Pursuant to *Pierce*, in the subject case, Special Master Dogan found, with extensive analysis, that all four (4) *Pierce* factors were satisfied. *See August 11, 2010 Report & Recommendation*, pp. 34-45. The Court hereby adopts the extensive conclusions of law and analysis of the *Pierce* factors made by Special Master Dogan, related to the *ex parte* contacts between Peters and DeLaughter and the effect of the same on the case, and knowledge of the same by Eaton and/or its attorneys. Pursuant to the detailed analyses of the Special Master, adopted by this Court herein, the Court finds the following, by clear and convincing evidence and, also, by a preponderance of the evidence: Mississippi law, the *Pierce* factors, the interests of justice, and the integrity of the judicial system, support the Court's finding herein of improper and (1) fraudulent *ex parte* contacts between Peters and DeLaughter, (2) clear knowledge, either actual or implied, by Eaton and/or its counsel, and the willfulness of the same, (3) "turning a blind eye" and to the misconduct of Peters, and (4) violations of U.C.C.C.R. 1.10. Further, the Court finds the following case authority from other jurisdictions to be analogous to the factual situation herein. Pursuant to the case of *In re Aimster Copyright Litigation*, 334 F.3d

643, 650 (7th Cir. 2003), "willful blindness" is equated with actual knowledge. In *Barnhill v. U.S.*, 11 F.3d 1360, 1368 (7th Cir. 1993), the court noted that certain types of misconduct "raise concerns about the integrity and credibility of the civil justice system that...transcend the interests of the parties immediately before the court." *Id.* Based upon the foregoing, all of the claims of the Plaintiffs should be and hereby are dismissed with prejudice, based upon clear and convincing evidence of the Plaintiff's misconduct and knowledge of the improper *ex parte* and fradulent contacts of Peters, and then-Judge DeLaughter, by Eaton and its attorneys and officers.

CONCLUSION

In an April 6, 2007 Order of then-Judge Bobby B. DeLaughter, he found: "Allred is no longer an attorney of record in this case, and has been replaced... This Court has no doubt that the integrity of this Court will be maintained, and that false and misleading representations of Eaton's counsel are matters of the past." *See April 6, 2007 Opinion Order*, pg. 25-26. Regrettably, more than three years later, such conclusion stated by DeLaughter proved to be baseless. The evidence, as determined by the Special Master and as adopted by this Court herein, as carefully considered by the Special Master and adopted by this Court, and considered as clear and convincing evidence by this Court, has shown that when faced with damaging statements, e-mails and other proof regarding improper contacts between Peters and DeLaughter, Eaton's counsel failed to present a plausible explanation for their complacency with Peters' *ex parte* actions, "behind the scenes" with then-Judge DeLaughter. Instead, the clear and convincing evidence shows Eaton's counsel/officers either encouraged, or, at the very least, "looked the other way," as Peters received a cell phone call from DeLaughter, "took [Delaughter's] temperature" on important issues, and made "100%" predictions regarding

DeLaughter's rulings, '[maybe...off a percent or two].' *Everts Deposition*, pg. 54 ln. 24; *Exhibits* 5061; 5052. Instead, Eaton's counsels' selective memories and continuous 'story-changing' point to only one explanation: Eaton and its counsel knew of the serious improprieties occurring, on its behalf, between Peters and DeLaughter, and stood by "with blind eyes." In the opinion of this Court, there is only one sanction that will sufficiently deter this type of unacceptable and unethical behavior that strikes at the very core of our judicial system: a dismissal of the Plaintiffs' claims with prejudice. In *Scoggins*, the Mississippi Supreme Court stated:

> [P]erhaps the most compelling reason for granting Defendant's motion is to redress an apparently deliberate attempt to subvert the judicial process... 'A trial is a proceeding designed to be a search for the truth.' *Sims v. ANR Freight Systems, Inc.* 77 F.3d 846, 849 (5th Cir. 1996). When a party attempts to thwart such a search, the courts are obligated to ensure that such efforts are not only cut short, but that the penalty will be sufficiently severe to dissuade others from following suit.

Scoggins v. Ellzey Beverages, Inc., 743 So.2d 990, 994 (Miss. 1999).

The shocking facts of Peters' *ex parte* contacts with Judge DeLaughter, the clear knowledge by Eaton, as shown, with "red flags" being raised, Eaton's failure to take any corrective action and, instead, "looking away," require that this Court "protect the integrity of the Court and the judicial process," by imposing the most severe sanctions available: dismissal with prejudice of all of the Plaintiffs' claims against the Defendants. *See Pierce v. Heritage Properties, Inc.*, 688 So.2d 1385 (Miss. 1997)

The Court, herein, adopts the extensive analysis, findings and conclusions of Special Master Dogan in the November 24, 2009 and the August 11, 2010 Reports and Recommendations, unless otherwise specified herein. Any objections, made by the parties, that are inconsistent with this Court's ruling, herein, are hereby OVERRULED. The Court further,

based upon the law and evidence, finds that the Defendants are not entitled to a directed verdict on their counter-claims, and as a result, those claims remain.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is well-taken and hereby GRANTED. The Complaint and all of the claims of the Plaintiffs against the Defendants are hereby dismissed with prejudice. A separate final judgment will be entered this date, consistent with M.R.C.P. 54(b).

IT IS, FURTHER, ORDERED AND ADJUDGED that the Defendants' Motion for a Directed Verdict, regarding the counter-claims, as a matter of fact and law, is not well-taken and is hereby DENIED.

IT IS, FURTHER, HEREBY ORDERED AND ADJUDGED that this Court will retain jurisdiction of the Defendants' Motion for Determination of Sealed Documents

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SO ORDERED AND ADJUDGED this 22nd day of December, 2010.

W. SWAN YERGER
CIRCUIT COURT JUDGE